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No. 08-495

IN THE
Supreme Court of the United States

MANOJ NIJHAWAN,

Petitioner,

v.

ERIC H. HOLDER, JR.,
ATTORNEY GENERAL OF THE UNITED STATES,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF *AMICI CURIAE* ASIAN AMERICAN JUSTICE CENTER, ASIAN AMERICAN INSTITUTE, ASIAN LAW CAUCUS, ASIAN PACIFIC AMERICAN LEGAL CENTER, NATIONAL COUNCIL OF LA RAZA, *et al.*, IN SUPPORT OF PETITIONER

VINCENT A. ENG
Counsel of Record
KAREN K. NARASAKI
TUYET DUONG
ASIAN AMERICAN JUSTICE CENTER
1140 Connecticut Ave., NW
Suite 1200
Washington, DC 20036
(202) 296-2300

DAVID A. KETTEL
JACKIE M. JOSEPH
DONALD W. YOO
JOSHUA D. BRITTINGHAM
VENABLE LLP
2049 Century Park East
Suite 2100
Los Angeles, CA 90067
(310) 229-9900

Counsel for Amici Curiae
[*Additional Amici listed on inside cover*]

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INTERESTS OF *AMICI CURIAE* [1]

The classification of a criminal offense as an "aggravated felony" under the Immigration and Nationality Act ("INA") triggers the most severe consequences possible under this nation's immigration laws. These include: (1) ineligibility for asylum, cancellation of removal, and voluntary departure[2]; (2) subject to mandatory detention without bond[3]; (3) bar from re-admission into the United States[4]; (4) imprisonment of up to twenty years for returning to the United States unlawfully[5]; and (5) permanent bars to citizenship[6].

Notwithstanding these severe consequences, deportations of immigrant individuals reached a fifth consecutive high in 2007: Immigration and Customs Enforcement's ("ICE") Office of Immigration Statistics

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief and such consents are being lodged herewith.

[2] 8 U.S.C. §1229b(3); 8 U.S.C. §1229c(b)(1)(C); and 8 U.S.C. §§1158(b)(2)(A)(ii) and (B)(i).

[3] 8 U.S.C. §1226(c)(1)(B).

[4] 8 U.S.C. §§1182(a)(9)(A)(i) and (ii).

[5] 8 U.S.C. §1326(b)(2).

[6] 8 U.S.C. §1101(f)(8).

recently reported that it had apprehended nearly 961,000 foreign nationals and had removed more than 319,000 individuals.[7] The cases of over 99,000 of the individuals that ICE removed in 2007 involved allegations of past criminal activity.[8]

In this context, the recent attempts to broaden the Immigration Judge's ("IJ") inquiry into alleged facts underlying an individual's past criminal conviction, and the record numbers of individuals detained and removed due to ICE's renewed efforts to enforce our nation's immigration laws, leaves our communities with separated families, devastated children, and economic hardship. Some of the individuals impacted by deportation include parents who are sole providers for their families and have been longtime legal permanent residents in this county who have committed only a single crime during their entire lives in the United States. Many of the children separated from their parents are United States citizens who have never stepped foot in their parents' native countries or who do not speak the language of their parents' country of origin.[9]

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[7] U.S. Department of Homeland Security, Immigration Enforcement Actions: 2007 Annual Report (2008), *available at www.dhs.gov/xlibrary/assets/statistics/publications/enforcement_ar_07.pdf.*

[8] *See id.*

[9] *See* David Thronson, *Immigration Raids and the Destablization of American Families*, Wake Forest L. Rev. (2008); National Council for La Raza and the Urban Institute, Paying the Price: The Impact of Immigration Raids on America's Children (2007); *Forced Apart: Families Separated and Immigrants Harmed by U.S. Deportation Policy*, Human Rights Watch, July 2007.

In a time of unprecedented economic hardship and uncertainty for many families in our nation and abroad, this Court should reject an approach to analyzing an immigrant's criminal conviction that does not comport with due process and, if applied, may yield different results for individuals with similar offenses. Each immigrant family goes through its own private pain of deciding whether to invest precious resources, time, and money into building an immigration case. These families and their counsel should be able to make decisions based upon consistent and objective legal standards that yield predictable results under our immigration laws. Further, requiring the application of uniform legal standards in analyzing an immigrant's criminal conviction will minimize the opportunities for politically minded individuals, including IJs, to make decisions in immigration cases based upon political ideology or personal biases.[10]

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[10] It was recently uncovered that high-ranking officials at the U.S. Department of Justice ("DOJ") violated DOJ policy and federal law by using overt political and ideological considerations when filling key DOJ jobs such as immigration judges, according to a report issued by the DOJ's Inspector General's Office ("OIG Report"). Federal law and DOJ policy require career officials to be hired on merit and prohibit discrimination based on political affiliations. The OIG Report found that immigration judgeships were especially targeted for politicization: "we were only considering essentially Republican lawyers for appointment," Kyle Sampson stated, according to the OIG's report. Prior to 2004, immigration judges were appointed in an essentially non-political bureaucratic process handled by the Office of the Chief Immigration Judge. Vacancies were posted, interviews conducted and decisions

(Cont'd)

The Asian American Justice Center ("AAJC") is a national non-profit, non-partisan organization whose mission is to advance the human and civil rights of Asian Americans. Collectively, AAJC and its Affiliates, the Asian American Institute, Asian Law Caucus, and the Asian Pacific American Legal Center of Southern California, have over 50 years of experience in providing legal public policy, advocacy, and community education. A nationally recognized voice on immigration and immigrant rights on behalf of Asian Americans, AAJC has long spearheaded advocacy and education in the community on matters affecting families and individuals in immigration proceedings. Joining the AAJC as *amici curiae* in this brief are sixteen public interest, national advocacy, and civil rights organizations whose members or constituencies, often longtime lawful permanent residents, face the real world consequences of being separated from their families and being removed permanently from the United States.

The AAJC, and the *amici curiae* listed in the Appendix, respectfully submit this brief to apprise the Court of the real and unequitable consequences of going beyond the record of conviction when determining whether a criminal conviction renders an individual removable.

(Cont'd)

made by lower-level DOJ officials. Kyle Sampson's new process involved "coordination" with White House and an extra effort to get friends of the Bush administration into the judgeships when possible. *See* DOJ Office of Inspector Gen., An Investigation of Allegations of Politicized Hiring by Monica Goodling and Other Staff in the Office of the Attorney General (2008), *available at* http://www.usdoj.gov/oig/special/s0807/index.htm.

BACKGROUND

Despite the harsh consequences of an aggravated felony designation, immigration courts continue to struggle with applying consistent and predictable legal standards when determining whether an immigrant's conviction qualifies as an aggravated felony. Nowhere is this struggle for clarity and uniformity more apparent than in the differing standards employed by courts in analyzing whether an immigrant's conviction "involves fraud or deceit," under 8 U.S.C. § 1101(a)(43)(M)(i) (2008), and more specifically, the differing standards applied when analyzing whether "the loss to the victim or victims exceeds $10,000."

The categorical approach, summarized in *Taylor v. United States*[11] and *Shepard v. United States*,[12] is the traditional method for determining whether a particular conviction falls within the definition of an aggravated felony under the INA. *See Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 187 (2007). Broadly speaking, the categorical approach can take two forms. The first, commonly referred to as the "formal categorical approach," limits a court's analysis to the fact of conviction (excluding the facts underlying the conviction itself) and the legal elements of the statutory offense to determine whether those elements are congruent with the elements of the removal ground. *See id.* at 187-88; *Taylor*, 495 U.S. 575; *Kawashima v. Mukasey*, 530 F.3d 1111 (9th Cir. 2008). The second, commonly referred to as the "modified categorical approach," applies where a

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[11] 495 U.S. 575 (1990).

[12] 544 U.S. 13 (2005).

criminal statute is broader than the ground of removability. In that case, courts generally undertake a narrow circumscribed inquiry into whether what was established in the adjudication of guilt would subject the immigrant to removability. *Duenas-Alvarez*, 549 U.S. 183; *Taylor*, 495 U.S. at 602. A number of courts, including the Second, Ninth, and Eleventh Circuits, have applied the modified categorical approach in which they consider a narrow, specified set of documents that are part of the record of conviction in order to determine whether an immigrant's conviction satisfies the $10,000 loss requirement of section 1101(a)(43)(M)(i).[13]

In contrast, however, other courts, including the First, Third, and Fifth Circuits, have abandoned the "modified categorical approach" in favor of a more arbitrary standard, most recently coined by the Third Circuit as the "tethering" approach, which looks to see whether the "tether" of a loss in excess of $10,000 is sufficiently strong for purposes of section 1101(a)(43)(M)(i).[14] *See Nijhawan v. Att'y Gen. of the United States*, 523 F.3d 387, 395 (3d Cir. 2008). The adoption of the Third Circuit's "tethering" approach, as compared to the "modified categorical approach," would make it exponentially more difficult for IJs to determine whether the $10,000 loss amount was satisfied, and would invite IJs to conduct "mini-trials" during immigration hearings that may include new

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[13] *See Kawashima v. Mukasey*, 530 F.3d 1111 (9th Cir. 2008); *Dulal-Whiteway v. Dep't of Homeland Sec.*, 501 F.3d 116 (2d Cir. 2007); *Obasohan v. U.S. Att'y Gen.*, 479 F.3d 785 (11th Cir. 2007).

[14] *See Arguelles-Olivares v. Mukasey*, 526 F.3d 171 (5th Cir. 2008); *Conteh v. Gonzales*, 461 F.3d 45 (1st Cir. 2006).

testimony and evidence not subject to the strictures of the rules of evidence and due process required in criminal proceedings.[15]

Under the more arbitrary standard of the First, Third, and Fifth Circuits, individuals with the same convictions may face different results depending on alleged facts beyond what was established by the conviction. Such disparate treatment of individuals similarly situated raises significant due process concerns. The need for a predictable and objective standard to determine whether a conviction qualifies as an aggravated felony is of paramount importance given burgeoning immigration caseloads, overworked federal courts, diminishing government resources, and statutory time constraints mandated by immigration laws. Adoption of the "modified categorical approach" in which courts can consider a narrow and specified set of court documents that reflect the facts upon which the conviction actually and necessarily rested will provide greater predictability, consistency, and transparency for both the immigration courts and the criminal justice system at large. To be sure, criminal defendants subject to removability based upon their convictions need concise and uniform standards in which to base their plea decisions. Absent such objective standards, criminal defendants will lack the ability to meaningfully consider the full range of consequences of their guilty pleas and whether such pleas may result in their removal from this country — a punishment that is in many instances far greater and punitive than

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[15] *See Amici Curiae* Brief filed by the American Civil Liberties Union, at 22-27.

incarceration. *See Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922) (deportation may "result . . . in loss of both property and life; or of all that makes life worth living"); *Lok v. INS*, 548 F.2d 37, 39 (2d Cir. 1977) (deportation is a "sanction which in severity surpasses all but the most Draconian criminal penalties."); *United States v. Gonzalez-Medonza*, 985 F.2d 1014, 1016 (9th Cir. 1993) ("Deportation is a sanction as harsh or harsher than many sanctions provided by the criminal law.").

The arguments and case stories in this brief illustrate the concerns of *amici* and the important role the categorical approach plays in ensuring accurate and reliable determinations of whether immigrants in our communities should be subject to the serious consequences of being labeled an "aggravated felon."

SUMMARY OF ARGUMENT

The categorical approach set forth in *Taylor* and *Shepard* should govern the determination of whether the conviction or guilty plea of an immigrant constitutes an aggravated felony under 8 U.S.C. § 1101(a)(43)(M)(i). Under this analysis, a conviction is an aggravated felony where either: (1) a violation of the underlying statute of conviction necessarily involves every element of an aggravated felony; or (2) where the underlying offense is broader than the underlying offense and the jury was actually required to find all the elements of an aggravated felony. *See Taylor*, 495 U.S. 575; *Shepard*, 544 U.S. 13, 19-20; *Kawashima*, 530 F.3d at 1116.

The formal categorical approach most effectively ensures uniform application of immigration law and

avoids gross inequities to immigrants. Under this approach, Petitioner's conviction would not qualify as an aggravated felony under section 1101(a)(43)(M)(i). However, should this Court inquire beyond the formal categorical approach, this Court should adopt the well-accepted modified categorical approach applied by the Second, Ninth, and Eleventh Circuits. This Court should reject the ambiguous and subjective "tethering" approach of the Third Circuit adopted in the case below because it is ambiguous and will undoubtedly result in additional litigation to further define the parameters of that ill-defined standard. Meanwhile, immigration courts will struggle with the application of the "tethering" approach to determine whether an immigrant's conviction constitutes an aggravated felony. Therefore, the "tethering" standard should be rejected in favor of the modified categorical approach with a clear delineation that certain documents, specifically restitution orders, presentence investigative reports, and similarly unreliable sentencing documents, may not be considered or relied upon in determining the amount of loss under section 1101(a)(43)(M)(i).

Amici argue that the seriousness of an aggravated felony designation dictates a more careful and predictable standard for assessing convictions than the "tethering" approach. To illustrate the dangers of the "tethering" approach in the fraud-loss context, *amici* use case stories to show that restitution orders and other sentencing documents often go beyond the conviction in calculating loss amounts.

ARGUMENT

I. The Harsh Consequences Of An Aggravated Felony Mandate Careful And Accurate Review Of A Conviction To Determine Whether An Individual Qualifies As An Aggravated Felon.

Because Congress considers aggravated felonies "the most serious offenses" covered by the immigration laws, H.R. Rep. No. 109-345(I), at 69 (2005), it has reserved the most severe consequences for these offenses.

A. Permanent Removal From The United States

The INA provides that "[a]ny alien who is convicted of an aggravated felony at any time after admission is deportable." 8 U.S.C. § 1227(a)(2)(A)(iii). There is no requirement that the crime be committed within a certain number of years from the date of admission. In fact, immigrants are often detained and placed in removal proceedings five, ten, or even twenty years after conviction of an aggravated felony. *See*, *e.g.*, *Kuhali v. Reno*, 266 F.3d 93 (2d Cir. 2001) (finding a non-citizen deportable under a removal order issued twenty years after the conviction). Neither does it matter how long an individual has resided in the United States. *See*, *e.g.*, *Ayala-Chavez v. INS*, 944 F.2d 638, 640 (9th Cir. 2001) (finding an 18-year resident deportable even though most of his family resided near him and he had a minor daughter whom he supported). Individuals who are deported based on aggravated felonies face a permanent bar to returning to the United States. 8 U.S.C. § 1182(a)(9)(A)(ii).

B. Asylum

Asylum is a form of relief available to a non-citizen who fears persecution in his or her country of origin on account of "race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1158(b)(1)(B)(i). Similar to asylum, withholding of removal is a form of relief available to some otherwise deportable non-citizens whose "life or freedom" would be threatened on account of the same five factors. 8 U.S.C. § 1231(b)(3)(A). Unlike asylum, the relief of withholding of removal may not lead to permanent residence or naturalization, but usually serves as the last resort for removable individuals who would face extreme forms of persecution, torture, or even death should they return to their home country.

A non-citizen convicted of an aggravated felony, however, is permanently barred from seeking asylum. 8 U.S.C. § 1158(b)(2)(B)(i). Under the INA, an immigrant is ineligible for asylum if "convicted by a final judgment of a particularly serious crime." 8 U.S.C. § 1158(b)(2)(A)(ii). Aggravated felonies count as particularly serious crimes. *See id.*, § 1158(b)(2)(B)(i). Additionally, a non-citizen convicted of an aggravated felony is presumptively ineligible for withholding of removal. *See In re Y-L-*, 23 I. & N. Dec. 270, 273 (BIA 2002); 8 C.F.R. § 208.16(d)(2).

C. Mandatory Detention

Under 8 U.S.C. § 1226(c)(1), individuals in removal proceedings because of an aggravated felony conviction are subject to mandatory detention and thus ineligible for bond even if they can demonstrate that they are not a flight risk or danger to the community. Aggravated felons may be held in ICE custody for many months, or even years, before having their cases adjudicated. *See*, *e.g.*, *Flores-Torres v. Mukasey*, 548 F.3d 708 (9th Cir. 2008) (immigrant detained for over two years by DHS during removal proceedings in which immigrant was charged with removability for being an aggravated felony); *Valansi v. Reno*, 278 F.3d 203 (3d Cir. 2002) (immigrant detained for nearly a year under section 1226(c) during pendency of removal proceedings).

D. Unlawfully Entering The United States

Under 8 U.S.C. § 1326, non-citizens who unlawfully enter or re-enter the United States are subject to an array of penalties. All illegal entrants are subject to fines and prison terms. The most serious penalties – a fine, imprisonment for up to twenty years, or both – are reserved for non-citizens who were previously convicted of an aggravated felony. 8 U.S.C. § 1326(b)(2). In addition, anyone who aids or assists an aggravated felon in unlawfully reentering the United States faces a fine and/or up to ten years in prison. 8 U.S.C. § 1327.

E. Naturalization

Under 8 U.S.C. § 1427(a), an individual who wishes to naturalize must demonstrate "good moral character." But the INA states that "[n]o person shall be regarded as, or found to be, a person of good moral character who, during the period for which good moral character is required to be established, is, or was . . . one who at any time has been convicted of an aggravated felony." 8 U.S.C. § 1101(f). An aggravated felony is thus an automatic and permanent barrier to naturalization.

F. Violence Against Women's Act ("VAWA")

Through VAWA, Congress created a procedure that allowed battered immigrant women and their children to flee violent marriages without risking deportation.[16] VAWA permits abused spouses and their children or abused children and their parents to "self-petition" for lawful permanent resident status without the cooperation of the abusing relative or seek cancellation of removal. 8 U.S.C. §§ 1254(a)(1)(A) and (B). These provisions are intended to protect immigrant women and children whose batterers attempt to use their immigrant status as a means of inflicting physical, mental, emotional, and economic abuse on them. However, an applicant for a VAWA self-petition must demonstrate "good moral character." *See* 8 U.S.C. § 1254(a)(3); 8 C.F.R. § 204.2(c)(2)(v). As an aggravated felony precludes a finding of "good moral character," battered spouses and their children would be unable to seek relief under VAWA should they be found to have committed an aggravated felony.

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[16] Pub. L. No. 103-322, 108 Stat. 1941-42 (1994).

Eroding the categorical approach in the aggravated felony context brings more immigrants into the categories for which Congress intended the harshest consequences. This has the potential to lead to unintended results. For example, immigration attorneys who advise victims of domestic violence have relied on adjudicators' longstanding use of the categorical approach in assessing how their client's prior convictions will affect their eligibility for relief under VAWA. As one advocate puts it, "[t]hese are precisely the types of assessments that we need to do quickly and with relative certainty as to result, particularly given the time-sensitive and often dangerous situations our clients face while their immigration status is uncertain."[17] Eroding that categorical approach, even in the limited context of section 1101(a)(43)(M)(i), will cause unintended consequences in these adjudications.[18]

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[17] *See* Center for Battered Women's Legal Services, The Role of the Categorical Approach in Assisting Victims of Domestic Violence and Other Crimes Apply for U Nonimmigrant Status and VAWA Self-Petitions 4 (2009), *available at* http://www.immigrantdefenseproject.org/docs/09_Center-BatteredWomen'sLegalServicesPolicyBrief.pdf.

[18] *See id.* at 3-4

> if an underlying factual inquiry is permitted as to the loss amount, we would need to talk to our client in much more depth about the underlying facts alleged as part of any restitution and possibly seek out experts in loss calculations of the sort involved in her case to show that the loss was not related to her convicted conduct. This type of assessment is so fundamentally different from the work that any of us as immigration lawyers would normally do that it is unclear how we could make those assessments fairly and accurately for our clients.

II. The Categorical Approach Set Forth In *Taylor* And *Shepard* Should Govern As To Whether Petitioner's Conviction Constitutes An Aggravated Felony Under Section 1101(a)(43)(M)(i).

Under the strict categorical approach articulated in *Taylor* and *Shepard*, the failure of Petitioner's statute of conviction to contain a loss provision exceeding $10,000 is fatal to an aggravated felony determination. Indeed, as the Ninth Circuit has held, *Taylor* and *Shepard* require that "the statute of conviction must contain every element of the generic offense before we resort to the modified categorical approach." *Kawashima*, 530 F.3d at 1116; *see United States v. Gonzales-Terrazas*, 529 F.3d 293, 297-98 (5th Cir. 2008). As the statute under which Petitioner was convicted does not contain a loss amount, the inquiry whether that conviction qualifies as an aggravated felony should go no further. To find otherwise would result in gross inequities to those immigrants who pleaded guilty of a charge in which the amount of loss calculated was less than the $10,000 threshold, anticipating that the plea of guilty would place the conviction outside the scope of section 1101(a)(43)(M)(i).

However, if the Court's inquiry goes beyond the strict categorical approach, the Third Circuit's "tethering" analysis should be rejected in favor of the more objective and predictable modified categorical approach to determine whether Petitioner's conviction constitutes an aggravated felony. Courts have utilized the modified categorical approach to allow consideration of a narrow, specified set of court documents that are part of the record of conviction in order to determine

whether a jury was "actually required to find" or the defendant "necessarily admitted" to all the elements of the underlying offense. *See Shepard*, 544 U.S. at 16; *Taylor*, 495 U.S. at 602; *Gonzales-Terrazas*, 529 F.3d at 299-300 (Owen J., concurring). The Second, Ninth, and Eleventh Circuits apply this predictable and conventional approach to determine whether an immigrant's conviction satisfies the $10,000 loss requirement of section 1101(a)(43)(M)(i).[19]

In contrast, however, the First, Third, and Fifth Circuits have abandoned the "modified categorical approach" in favor of an ambiguous and novel standard, most recently coined by the Third Circuit as the "tethering" approach. This analysis looks to see whether the "tether" of a loss calculation in excess of $10,000 outside the record of conviction is sufficiently strong for purposes of section 1101(a)(43)(M)(i).[20] *See Nijhawan*, 523 F.3d at 395. The Third Circuit does not advance a useful definition for the "tethered" test. Instead, the court merely held that the "tethered" test was satisfied by the facts of the case, declining to "opine[] as to the nature of the nexus required, or the breadth of the inquiry into the facts." *Id.* As the dissent in *Nijhawan* justifiably argues, however, such an ambiguous and ill-defined standard will wreak havoc on the immigration courts and will undoubtedly result in further litigation seeking to define the parameters of the "tethered" inquiry. *See id.* at 401 n. 15 (Stapleton, dissenting) ("[t]he task of defining the 'tethered' inquiry will fall to future

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[19] *See Kawashima*, 530 F.3d 1111; *Dulal-Whiteway*, 501 F.3d at 128-29; *Obasohan*, 479 F.3d 785.

[20] *See Arguelles-Olivares*, 526 F.3d 171; *Conteh*, 461 F.3d 45.

panels of this Court, and with the loss element divorced from the conviction requirement, the task will not be an easy one.").

The adoption of the Third Circuit's "tethering" approach, as compared to the "modified categorical approach," would make it exponentially more difficult for IJs to determine whether the $10,000 loss amount was satisfied and would invite the introduction of myriad documents not otherwise part of the conventional "record of conviction" to calculate the amount of loss. *See id.* (concerns as to whether IJs would be able to review PSIs or facts in a police report, or look to new testimony or documents introduced at the removal hearing under the "tethered" standard). Indeed, under the "tethering" approach, courts would be permitted to consider evidence from the sentencing phase as well as evidence outside of the underlying record altogether. To permit the consideration of such expansive and unreliable evidence outside the record of conviction would render due process in immigration proceedings a nullity.

III. Courts Should Not Rely Upon Sentencing Documents Such As Restitution Orders And Presentence Investigation Reports Because Those Documents Are Unreliable To Prove The Amount Of Loss Under Section 1101(a)(43)(M)(i).

As Section II, *supra*, makes clear, the categorical approach prohibits reliance on documents such as a restitution order or a presentence investigation report ("PSI") that do not relate to what was necessarily found by a jury or admitted by the defendant as part of the

conviction. However, there is a related and separate question as to whether such documents are reliable in any event.

Circuit courts differ as to whether reliance on a restitution order and a PSI may be relied upon to determine the amount of loss to the victim under section 1101(a)(43)(M)(i). The First, Third, Fifth, and Sixth Circuits have permitted reliance on restitution orders for this very purpose.[21] In contrast, the Second, Seventh, and Eleventh Circuits have generally prohibited reliance on restitution orders because such documents are not only outside the record of conviction, but they have been shown to be unreliable.[22] With respect to the use of PSIs, the Fifth and Seventh Circuits permit reliance on PSIs, at least in certain circumstances,[23] while the First, Second, Seventh, Ninth and Eleventh Circuits prohibit reliance on PSIs.[24]

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[21] *Nijhawan v. Att'y Gen.*, 523 F.3d 387, 389, 396 (3d Cir. 2008); *Graham v. Mukasey*, 519 F.3d 546, 548 (6th Cir. 2008); *Martinez v. Mukasey*, 508 F.3d 255, 257, 259-61 (5th Cir. 2007); *Rivera-Bottzeck v. Gonzales*, 240 F. App'x 272, 277 (10th Cir. 2007) (unreported opinion); *Conteh v. Gonzales*, 462 F.3d at 59; *Chang v. INS*, 307 F.3d 1185, 1190-92 (9th Cir. 2002); *Khalayleh v. INS*, 287 F.3d 978, 979-80 (10th Cir. 2002).

[22] *Dulal-Whiteway*, 501 F.3d at 134; *Obasohan*, 479 F.3d at 789; *Knutsen v. Gonzales*, 429 F.3d 733, 735, 739 (7th Cir. 2005).

[23] *Arguelles-Olivares*, 526 F.3d at 179-80; *Ali v. Mukasey*, 521 F.3d 737, 743 (7th Cir. 2008); *James v. Gonzales*, 464 F.3d 505, 512 (5th Cir. 2006).

[24] *Manning v. Mukasey*, 270 F. App'x 631, 633 (9th Cir. 2008) (unreported opinion); *Dulal-Whiteway*, 501 F.3d at 129; *Obasohan*, 479 F.3d at 789; *Conteh*, 461 F.3d at 58-59; *Knutsen*, 429 F.3d at 735, 739; *Chang*, 307 F.3d at 1191.

Reliance upon sentencing documents, which are subject to lower burdens of proof and may contain monetary losses attributable to third parties or unconvicted monetary loss, raises significant due process and constitutional concerns for immigrants. This necessitates their disallowance. *Blakely v. Washington*, 542 U.S. 296, 312 (2004) (noting the unfairness of large sentence enhancements based on facts in a PSI proven by a mere preponderance). For the reasons set forth below, *amici* request that this Court adopt a rule, such as that adopted by the Second Circuit in *Dulal-Whiteway*[25], which prohibits reliance on both restitution orders and PSIs, and other similarly unreliable sentencing documents, to determine whether the $10,000 loss amount under section 1101(a)(43)(M)(i) has been met.

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[25] *See Dulal-Whiteway v. U.S. Dep't of Homeland Sec.*, 501 F.3d 116, 128-29 (2d Cir. 2007) (identifying the documents permitted as part of the "record of conviction" as "a charging document (such as an indictment), a signed plea agreement, a verdict or judgment of conviction, a record of the sentence[,] a plea colloquy transcript, and jury instructions").

A. Reliance Upon Restitution Orders To Calculate The Amount Of Loss Under Section 1101(A)(43)(M)(I) Does Not Comport With Due Process And May Result In Unfair Removal Of Long-Time Lawful Permanent Residents Such As The Petitioner With Only One Conviction.

In *Nijhawan*, the Third Circuit noted that a restitution order, which by its nature is neither found by a jury nor specifically pleaded to by a defendant, could be considered in determining whether the $10,000 loss amount had been satisfied. *See Nijhawan*, 523 F.3d at 394. However, it is fundamentally unfair to rely upon a restitution order to calculate the loss amount. The restitution order does not represent what was established by the conviction, and relying on it permits the government to supplant its burden of proof of establishing by "clear and convincing evidence" an immigrant's removability through a document subject to the lower "preponderance of the evidence" standard. Furthermore, the restitution amount may be based upon losses not attributable to the actual defendant and conduct unrelated to the charges to which the defendant pleaded guilty or to which the defendant was convicted.

1. The Government's Burden To Establish Removability By Clear And Convincing Evidence Cannot Be Satisfied By Relying Upon Restitution Orders That Are Subject To A Preponderance Of The Evidence Standard.

Administrative proceedings in which an immigrant may be ordered deported from the United States involve the potential deprivation of a significant liberty interest and must be conducted according to the principles of fundamental fairness and substantial justice. *See Landon v. Plasencia*, 459 U.S. 21, 34- 35 (1982); *see also Bridges v. Wixon*, 326 U.S. 135, 154 (1945) ("though deportation is not technically a criminal proceeding, it visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom. . . Meticulous care must be exercised lest the procedure by which he is deprived of that liberty not meet the essential standards of fairness.").

The government has asserted that, consistent with the BIA decision *In re Babaisakov*, 24 I. & N. Dec. 306 (BIA 2007), courts should be permitted to consider *any* evidence (including restitution orders) when determining whether an immigrant's conviction satisfies one of the aggravated felony definitions. To do so, however, fundamentally undermines the fairness of immigration proceedings because it permits the government to rely upon sentencing documents that are subject to a lower burden of proof in order to establish an immigrant's removability.

Federal law provides that the burden of proof for restitution orders is preponderance of the evidence.[26] 18 U.S.C. § 3664(e); *see United States v. Danford*, 435 F.3d 682, 689 (7th Cir. 2006) ("[r]estitution is determined by the judge using the lower preponderance of the evidence standard."). In comparison, however, the INA imposes a heightened burden of proof in removal proceedings, requiring the government to establish by *clear and convincing evidence* that the immigrant is deportable. 8 U.S.C. § 1229a(c)(3)(A); 18 U.S.C. § 3664(e). In doing so, the INA codifies this Court's decision in *Woodby v. INS*, which rejected the "mere preponderance of the evidence" burden of proof in light of the "drastic deprivations that may follow when a resident of this country is compelled by our Government to forsake all the bonds formed here and go to a foreign land where [he or she] often has no contemporary identification."[27] 385 U.S. 276, 284-86 (1966). Undoubtedly with these concerns in mind, Congress took pains to identify the classes of documents and records which may be relied upon by the immigration courts as proof of a criminal conviction. 8 U.S.C. § 1229a(c)(3)(B) (listing documents and records that "shall constitute proof of a criminal conviction"). These sources of evidence are "substantially similar to those

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[26] The procedure for ordering restitution under both the Victim and Witness Protection Act of 1982 ("VWPA") and the Mandatory Victims Restitution Act ("MVRA") is outlined in 18 U.S.C. §§ 3663(d), 3664, and 3663A(d).

[27] In *Woodby v. INS*, this Court decreed that the burden of proof in removal proceedings is that of "clear, unequivocal, and convincing evidence that the facts alleged as grounds for deportation are true. *Woodby v. INS*, 385 U.S. at 284-86.

described as within the bounds of the inquiry in *Taylor* and *Shepard*." *Kawashima*, 530 F.3d at 1122 n.3. The reasons for such are clear: Reliance on restitution orders and other sentencing documents to establish the loss amount under section 1101(a)(43)(M)(i) would undermine the fundamental fairness inherent in due process because aggravated felony determinations would be based upon findings that were not "actually found" by or a jury or "necessarily admitted" by the defendant in the criminal case below – precisely the type of information that may conflict with an immigrant's agreed upon plea bargain or convicted charge.

2. The Amount Of Restitution Ordered May Exceed The Actual Loss To The Victims And May Include Restitution For Criminal Conduct And Losses Attributable To Co-Conspirators.

In addition to the irreconcilable burdens of proof, courts should be prohibited from relying on restitution orders to determine the loss amount under section 1101(a)(43)(M)(i) because defendants may be ordered to pay restitution far in excess of the loss to which he or she pleaded, or of which he or she was found guilty. For purposes of restitution, federal law broadly defines the term "victim" as "a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered, including, in the case of an offense that involves as an element a scheme, conspiracy, or pattern of criminal activity, any person directly harmed by the defendant's criminal conduct." 18 U.S.C. § 3663(a)(2). Courts have interpreted this broad language to permit, in conspiracy cases, orders

for restitution for all losses caused as a result of the conspiracy, whether the defendant was convicted of each of the underlying substantive offenses or not. *See United States v. Collins*, 209 F.3d 1, 3 (1st Cir. 1999); *see also United States v. Plumley*, 993 F.2d 1140, 1142 n. 2 (4th Cir. 1993) (amendments do not "usurp[] the settled principle that a criminal defendant who participates in a conspiracy is liable in restitution for all losses flowing from that conspiracy"); *United States v. Lewis*, 104 F.3d 690, 693 (5th Cir. 1996) (defendant responsible for entire amount of loss caused by conspiracy regardless of whether he personally participated in each illegal transaction).

Further, in conspiracy cases where more than one defendant contributed to the loss of a victim, courts have wide latitude to attribute restitution to either specific defendants or jointly and severally among all co-defendants. *See* 18 U.S.C. § 3664(h); *United States v. Boyd*, 222 F.3d 47, 50 (2d Cir. 2000). In do doing, courts may even consider "uncharged or acquitted counts." *Boyd*, 222 F.3d at 51. Moreover, these statutes allow a sentencing court to grant restitution even to alleged victims not named in the indictment. *United States v. Henoud*, 81 F.3d 484, 489 (4th Cir. 1996).

Under these circumstances, a restitution order would be wholly unreliable for purposes of establishing the amount of loss. Indeed, reliance upon a restitution order that may establish a loss amount based upon conduct attributable to other co-defendants would run afoul of the requirement that courts "may rely only upon facts to which a defendant *actually and necessarily* pleaded in order to establish the elements of the offense,

as indicated by a charging document, written plea agreement, or plea colloquy transcript." *Dulal-Whiteway*, 501 F.3d at 131 (emphasis added); *see also Shepard*, 544 U.S. at 20 ("With such material in a pleaded case, a later court could generally tell whether the plea had 'necessarily' rested on the fact identifying the [prior crime] as [the enumerated offense.]").

Consequently, for an individual pleading guilty – even one who is able to specify his or her actual loss amount in the plea agreement – the amount of restitution ordered will likely not be limited to the actual losses suffered in connection with plea or a conviction. In fact, restitution orders and other sentencing documents often go beyond the conviction in calculating loss amounts, as demonstrated in the following cases where indictments addressed specific loss amounts.

- Steve Chang has been an LPR since 1975 when he moved from South Korea to the United States with his family. Mr. Chang was indicted on fourteen counts of bank fraud for allegedly passing bad checks. He pleaded guilty to only one of the counts, which charged him with cashing a $605.30 counterfeit check at a grocery store. The plea agreement explicitly stated the "exact loss to the victim" for the lone offense to which he pleaded guilty was $605.30. The plea agreement also stated that Mr. Chang and the government agreed that he would make restitution "in excess of the specific loss caused by the check" in the count to which he pleaded guilty, within a range of $20,000 to $40,000. Pursuant to the plea, Mr. Chang was sentenced

to eight months and ordered to pay $32,628.67 in restitution. Subsequently, the INS initiated removal proceedings. Relying on the restitution order, the IJ held that Mr. Chang's conviction by guilty plea qualified as an aggravated felony even though the restitution amount included "numerous other alleged fraudulent transactions" to which he did not plead guilty, but for which he agreed to make restitution. In doing so, the IJ relied on a restitution amount that did not reflect the loss to the victim from the convicted conduct and was instead bargained for by Mr. Chang in exchange for the government's agreement to drop the remaining counts. On appeal, the Ninth Circuit held that reliance on the restitution stipulation for determining the amount of loss was improper, and therefore Mr. Chang was not an aggravated felon. Mr. Chang's case illustrates criminal courts will order restitution for counts dropped as part of a plea agreement and then IJs will rely on the restitution order to arrive at a loss to the victim(s) that is greater than the actual loss caused by the offense to which the defendant pleaded guilty. Had the approach of the IJ and BIA been followed, Mr. Chang – a long-time lawful permanent resident who had never returned to South Korea since he left, did not speak or understand Korean, and received his entire education in the U.S. public school system – would have been deported for having committed an aggravated felony even though

the actual loss to the victim fell "about $9,400 shy of qualifying as an aggravated felony."[28]

- Jon Knusten was admitted to the United States as an LPR in 1957. Mr. Knutsen was indicted for two counts of bank fraud alleging a scheme to defraud his employer-bank. Mr. Knutsen pleaded guilty to one count, which alleged a total loss of $7,350. A second count, accusing Mr. Knutsen of orchestrating a check-kiting scheme, was dismissed as part of a plea. The judgment order stated a total amount of restitution of $22,480. The Seventh Circuit held that the losses related to "relevant conduct" that Mr. Knutsen stipulated to should not be considered in determining whether the losses to the victim from the offense of conviction exceeded $10,000. Since the plea agreement "plainly documented" the loss for the offense of conviction as $7,350, a monetary loss amount insufficient to find Mr. Knutsen had committed an aggravated felony, the court vacated the IJ's order of removal.[29] *Knusten* illustrates restitution orders frequently order restitution amounts based at least in part on conduct for which the defendant has not been convicted.

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[28] *Chang*, 307 F.3d at 1187-90; Brief of Appellant at 1-2, *Chang v. INS*, 307 F.3d 1185 (9th Cir. 2002) (No. 01-35626), 2001 WL 34091163, at *1-2.

[29] *Id.* at 735, 739-40.

- Luz Elena Lopez De Rowley has been an LPR since 1970, when she married her U.S. citizen husband. In March 2000, Ms. Rowley pleaded guilty to conspiracy to commit mail fraud by submitting false claims to her insurance company. The indictment alleged three fraudulent checks, one of which was for less than $10,000.[30] Several of the counts were dismissed as part of her plea, and she was ultimately sentenced to serve 12 months in prison and, along with her co-conspirators, ordered to pay restitution in the amount of $55,808.42.[31] Relying on the restitution order and the indictment, the IJ found that Mrs. Rowley's conviction by guilty plea qualified as an aggravated felony. Based on this holding, the IJ ordered her deportation despite her status as an LPR for over 30 years with no prior criminal conviction. On appeal, the Second Circuit reiterated the court's prohibition on relying on restitution orders under its *Dulal-Whiteway* standard and held that Mrs. Rowley was not an aggravated felon. Since the government did not submit the plea allocution at her immigration hearing, the court held it was not possible to determine whether she had "actually and necessarily pleaded" to a loss greater than $10,000. Mrs. Rowley would have had a different outcome in her case under the Third Circuit's approach, which permits the use of restitution orders to establish loss.

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[30] *Lopez-De Rowley v. INS*, 253 F. App'x 62, 64 (2d Cir. 2007).

[31] Appellant Brief at 4, *Lopez-De Rowley v. INS*, 253 F. App'x 62 (2d Cir. 2007) (No. 01-4172-AG), 2006 WL 6106168, at *4.

As these examples illustrate, in cases where the conviction record specifies monetary loss attributable to different counts in an indictment, the modified categorical approach is capable of distinguishing between cases in which the loss is under, or over, $10,000. Thus, there is no need for a "tethering" approach or any reference to the restitution order. To the contrary, as these cases illustrate, the restitution order clouds the underlying question of the loss that is attributable to the conduct for which the individual was convicted, and immigrants who plead to a specific loss amount in the plea agreement expecting that the loss amount would place that conviction outside the scope of an aggravated felony may nevertheless face deportation.

Restitution orders present the same problems when the counts in the indictment to which the defendant entered a plea do not include specific dollar amounts connected to the charged fraudulent activity. As illustrated below, the use of a restitution order places the immigrant in the impossible position of being presumed to have caused a loss for which the person was not convicted and which may have been computed based on unreliable evidence.

- Spencer Dulal-Whiteway is a citizen of Trinidad and Tobago who was lawfully admitted to the United States in 1996. Mr. Dulal resided in New York with his mother, step-father, and brother. He was enrolled in college in New York and had been employed performing computer related services.[32] Nearly 5 years after being admitted

[32] Petitioner's Brief in Support of Petition for Review at 7, *Dulal-Whiteway v. U.S. Dep't of Homeland Sec.*, 501 F.3d 116 (2d Cir. 2007) (No. 05-3098-ag), 2006 WL 5737398, at *7.

> to the United States, Mr. Dulal was indicted for using unauthorized access devices to obtain items of value of $1,000 or more and with making false statements in connection with the acquisition of a firearm. Mr. Dulal pleaded guilty to these two matters. The Probation Office thereafter prepared a PSI and recommended Mr. Dulal pay $20,824.09 in restitution The court issued a restitution order establishing the loss amount at $20,824.09. Thereafter, the INS began removal proceedings, alleging that he had been convicted of making false statements to acquire a firearm and that he had been convicted of an offense involving fraud or deceit where loss to the victims exceeded $10,000. The IJ found Mr. Dulal's firearm offense rendered him removable under the INA. Additionally, the IJ found Mr. Dulal removable for his fraud conviction after consulting the PSI and the restitution order – documents which the IJ stated established a loss over $20,000. On apeal, the Second Circuit found that Mr. Dulal had only been alleged of causing a loss greater than $1,000 and found no evidence in the record of a plea allocution or written plea agreement indicating that he admitted to causing a loss exceeding $10,000.[33]

Dulal-Whiteway illustrates the terrible unfairness of permitting courts to rely on the restitution orders to calculate the amount of monetary loss. Unlike *Chang*, *Knutsen* and *Lopez De Rowley*, the criminal record of conviction lacks the evidence to show that the restitution order goes beyond the charges to which Mr. Dulal pleaded.

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[33] *Dulal-Whiteway*, 501 F.3d at 118-20, 123-34.

Had the IJ been permitted to go beyond the record of conviction, Mr. Dulal would have faced deportation even though the charges to which he pled only indicated a loss greater than $1,000. As *Dulal-Whiteway* shows, restitution orders are often mere restatements of PSIs, which involve allegations of fact that may either explicitly diverge from the indicted amount, or involve an underlying indictment that does not have the easy check-by-check counts that allow an IJ to determine whether the loss truly involves indicted and convicted amounts. *See* Section III.B, *infra*. Limiting review to only the record of conviction documents specified in *Taylor* and *Shepard* alleviates these concerns by focusing only on what was actually established by the conviction.

B. Reliance Upon Presentence Investigation Reports To Calculate The Amount Of Loss Under Section 1101(A)(43)(M)(I) Similarly Fails To Comport With Due Process And May Also Result In Unfair Removal Of Long-Time Lawful Permanent Residents.

1. The Government's Burden To Establish Removability By Clear And Convincing Evidence Cannot Be Satisfied By Relying Upon Presentence Investigation Reports.

Unlike restitution orders, the facts contained in a PSI do not represent court findings unless the PSI is challenged. Even when challenged, the facts in the PSI need only be proven by a preponderance of the evidence — a lower standard than the heightened clear and convincing evidence standard required of the government in establishing an immigrant's removability.

See United States v. Greene, 41 F.3d 383, 386 (8th Cir. 1994). Thus, to permit the government to rely upon facts contained in a PSI to establish whether the $10,000 loss amount had been satisfied would be fundamentally unfair as it would allow the government to circumvent its statutory burden of proof in immigration proceedings. The Eleventh Circuit recently held as much in *Obasohan v. U.S. Att'y Gen.*, 479 F.3d 785 (11th Cir. 2007). There, the court ruled that it was error for the IJ to rely on the restitution amount recommended in the PSI to establish that the loss to the victims exceeded $10,000 under section 1101(a)(43)(M)(i) because the factual findings were based on allegations in the PSI and were made under the preponderance rather than the clear and convincing evidence standard. *See id.* at 791. Therefore, reliance on a PSI to determine the monetary loss amount should be prohibited.

2. Information Contained Within A Presentence Investigation Report May Include Loss Amounts In Excess Of The Actual Loss To The Victims To Which The Defendant Pleaded Or Was Found Guilty.

As with restitution orders, the use of PSIs to establish the loss amount under section 1101(a)(43)(M)(i) should be prohibited because loss amounts in the PSI may be based on conduct unrelated to the defendant as well as loss amounts far exceeding the loss to which the defendant pleaded or was found guilty. Under the U.S. Sentencing Guidelines, sentencing courts – including those calculating loss amount in fraud cases – may consider not only the conduct for which the defendant

was convicted but also "relevant conduct." [34] *See United States v. Boesen*, 541 F.3d 838, 850-51 (8th Cir. 2008) (affirming consideration of relevant conduct in calculating loss amount). It is well-settled that such "relevant conduct" may include conduct for which the defendant was never charged or was *acquitted*,[35] previously untried conduct proven by a mere preponderance,[36] and in at least one circuit, even losses no longer prosecutable because they fall outside the statute of limitations.[37] Thus, sentencing courts are allowed to – and in fact do – rely on unconvicted "relevant" conduct routinely contained in a PSI in making sentencing determinations.

Further, the scope of sentencing inquiry – and therefore of the PSI – is largely unlimited. *United States v. Tucker*, 404 U.S. 443, 446 (1972) ("[A] judge may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come."). PSIs may even contain hearsay. *Gregg v. United States*, 394 U.S. 489, 492 (1969) ("There are no formal limitations

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[34] *See* U.S. SENTENCING GUIDELINES MANUAL § 1B1.3 (2004) (defining relevant conduct).

[35] *See United States v. Watts*, 519 U.S. 148 (1997) (per curiam) (holding that sentencing courts can consider acquitted conduct).

[36] *United States v. Bras*, 483 F.3d 103, 107-08 (D.C. Cir. 2007) (holding that reliance on acquitted conduct proven by a preponderance compelled permitting reliance on previously untried conduct).

[37] *Obasohan*, 479 F.3d at 790 (citations omitted).

on [PSI's] contents, and they may rest on hearsay and contain information bearing no relation whatever to the crime with which the defendant is charged.");

Consequently, when an IJ relies on a PSI in determining whether the loss to the victim exceeds $10,000, it may be unclear whether that amount includes loss attributable to uncharged or acquitted conduct. Ultimately, an immigrant may be ordered deported even though their offenses of conviction did not actually meet the $10,000 loss threshold. As the below cases demonstrate, this unjust result will subject immigrants who pleaded guilty to, or were convicted of, conduct causing actual loss under the $10,000 threshold to the draconian consequence of deportation. Many of these immigrants are long-term residents of the United States with little or no connection with their native countries.

- Etetim James, a native and citizen of Nigeria, was admitted to the United States in 1986 and became an LPR in 1987. In 2000, Mr. James pleaded guilty to one count of aiding and abetting bank fraud (18 U.S.C. §§ 2 and 1344) involving a transaction with a credit union in the amount of $9,500. The judgment of conviction ordered Mr. James to serve a 24 month sentence and to pay restitution in the amount of $129,066,60. Upon completion of his sentence, Mr. James was charged with removability under section 1101(a)(43)(M)(i). At his removal hearing, the IJ terminated removal proceedings on the grounds that the government had failed to demonstrate that the loss to the victims exceeded $10,000 since he pleaded guilty to a

single count of only $9,500. On appeal, the Fifth Circuit vacated the IJ's order after concluding that the amount of restitution Mr. James owed, based upon conduct included in the indictment, PSI, and judgment of conviction, constituted the proper amount to use in determining the amount of loss to the victims. The court looked to the PSI which documented an intended loss totaling more than $186,470. The court held that Mr. James had committed an aggravated felony.[38]

- Julius Obasohan, an LPR, was indicted on one count of conspiracy to produce, use and traffic in counterfeit access devices by obtaining a third-party's credit card. Mr. Obasohan pled guilty to the sole count of conspiracy in the indictment. Mr. Obasohan did not admit to any loss in his plea agreement. During the plea colloquy, the government stated "there was no loss because the new credit card was being sent to the recipient," and the court stated the amount of loss was zero. However, the subsequently-prepared PSI stated that "further investigation had uncovered Mr. Obasohan's fraudulent use of other credit cards which had caused losses in excess of $37,000." The PSI recommended restitution of $37,000. The court sentenced Mr. Obasohan to 41 months and ordered $37,000 in restitution as recommended in the PSI. DHS initiated removal proceedings and the IJ, relying upon the restitution order, found that Mr. Obasohan

[38] *James*, 464 F.3d at 506-12.

caused loss to the victim in excess of $10,000, and was thus an aggravated felon. The Eleventh Circuit held that that IJ's reliance on the amounts contained in the restitution order to establish loss to the victim was improper. The restitution was not based on the conspiracy charge to which Mr. Obasohan pleaded guilty. Instead, the order was based on "*additional* conduct" alleged "only in the PSI," which Mr. Obasohan denied. The court noted that the INA "does not authorize removal on the basis of the relevant conduct that may be considered at sentencing." [39] Accordingly, the court remanded the matter to the BIA. Had the IJ been permitted to rely on the restitution amount recommended in the PSI, Mr. Obasohan – a *pro se* habeas petitioner and LPR – would have been deported despite the fact that the government and the court agreed there was no loss to the victim from the offense of conviction.[40]

- Joel Arguelles-Olivares immigrated to the United States over 30 years ago and has been an LPR since 1977. Mr. Olivares' mother, two sisters, and two brothers are all naturalized citizens. Mr. Olivares married in 1993 and has two U.S. citizen children. Since 1978, Mr. Olivares has been a self-employed masonry contractor who has been financially successful in that capacity and regularly employs a number of individuals. In 2003, Mr. Olivares was charged

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[39] *Obasohan*, 479 F.3d at 788.

[40] *See id.* at 786-90.

> and pleaded guilty to a single count of filing a false income tax return. Mr. Olivares was sentenced to 21 months imprisonment but was not fined or ordered to pay any restitution. Following his conviction, DHS initiated removal proceedings alleging Mr. Olivares had been convicted of an aggravated felony under section 1101(a)(43)(M)(i). Mr. Olivares asserted there was no evidence that his conviction involved a loss exceeding $10,000 because the judgment of conviction did not mention the amount of actual loss. Mr. Olivares further argued it was improper for the IJ to rely on the PSI as evidence of the amount of loss. The only document in the record that provided any indication of the amount Mr. Olivares underpaid his taxes was the PSI. Mr. Olivares argued that the PSI must be excluded under the "categorical approach" of examining prior convictions. The court calculated the loss based upon a review of the PSI which specified the total amount of loss to be $248,335 for the years 1996-2000. The court found that the offense of conviction was an aggravated felony.[41] However, as the dissenting judge emphasized, PSIs often include unconvicted loss.

Because PSIs may base an amount of loss upon losses which may be attributable to other co-defendants as well as take into account uncharged and/or acquitted conduct in determining loss, PSIs are an unreliable source of information upon which to base a loss amount under section 1101(a)(43)(M)(i). Accordingly, its use should be disallowed for this purpose.

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[41] *Arguelles-Olivares*, 526 F.3d at172, 175-80.

CONCLUSION

For the reasons set forth above, *amici* respectfully submit that the judgment of the court of appeals should be reversed.

Respectfully submitted,

VINCENT A. ENG
Counsel of Record
KAREN K. NARASAKI
TUYET DUONG
ASIAN AMERICAN
JUSTICE CENTER
1140 Connecticut Ave., NW
Suite 1200
Washington, DC 20036
(202) 296-2300

DAVID A. KETTEL
JACKIE M. JOSEPH
DONALD W. YOO
JOSHUA D. BRITTINGHAM
VENABLE LLP
2049 Century Park East
Suite 2100
Los Angeles, CA 90067
(310) 229-9900

Counsel for Amici Curiae

APPENDIX

List of *Amici Curiae*

Asian American Justice Center ("AAJC")
AAJC is a national non-profit, non-partisan organization whose mission is to advance the human and civil rights of Asian Americans. Collectively, AAJC and its Affiliates, the Asian American Institute, Asian Law Caucus, and the Asian Pacific American Legal Center of Southern California, have over 50 years of experience in providing legal public policy, advocacy, and community education. A nationally recognized voice on immigration and immigrant rights on behalf of Asian Americans, AAJC has long spearheaded advocacy and education in the community on matters affecting families and individuals in immigration proceedings. AAJC has testified before Congress numerous times and has long worked with the executive branch on policy solutions that would ensure that the government conducts immigration proceedings that comport with principles of due process and fairness.

The Asian Pacific American Legal Center of Southern California ("APALC")
APALC was founded in 1983 and is the largest non-profit public interest law firm devoted to the Asian Pacific American community. APALC provides direct legal services and uses impact litigation, public advocacy and community education to obtain, safeguard, and improve the civil rights of the Asian Pacific American community. APALC serves 15,000 individuals and organizations each year through direct services, outreach, training, and technical assistance. Its primary areas of work include

workers' rights, anti-discrimination, immigrant welfare, immigration and citizenship, voting rights, and hate crimes. APALC employs policy advocacy and case work to represent the interests and due process rights of individuals who could be repatriated and removed from the country. It is in this interest that we participate with our affiliate AAJC on this brief.

Asian American Institute ("AAI")
AAI is a pan-Asian, non-partisan, not for profit organization located in Chicago, Illinois, whose mission is to empower the Asian American community through advocacy, by utilizing coalition building, education, and research. AAI's programs include community organizing, leadership development, and legal advocacy. Asian Americans are a diverse and often overlooked community, but they are one of the fastest-growing populations in the United States. Because AAI strives to give a human face to the immigration-related challenges that Asian Americans experience, AAI has an important interest in *Nijhawan v. Holder*. Applying inconsistent and unduly harsh standards in removal proceedings, as the Third Circuit did against Nijhawan, is unfair to immigrants and their families and violates applicable principles of law.

The Asian Law Alliance ("ALA")
ALA, founded in 1977, is a nonprofit public interest legal organization with the mission of providing equal access to the justice system to the Asian and Pacific Islander communities in Santa Clara County, California. ALA has provided community education and legal services on

immigration issues and has represented immigrants with criminal convictions before U.S. Citizenship and Immigration Services.

The Asian Law Caucus ("ALC")
ALC is a nonprofit, public interest legal organization whose mission is to promote, advance, and represent the civil rights of Asian Pacific Islander communities. Founded in 1972, the ALC is the nation's oldest Asian Pacific Islander civil rights legal organization. The ALC has provided legal services and community education on discrimination, represented individuals in discrimination suits, and conducted local and regional policy advocacy on the importance of diversity programs. The ALC has a history of representing individuals in removal proceedings, particularly juveniles. ALC has long promoted principles of due process and fairness in immigration proceedings, especially where defendants are vulnerable and without language skills and resources to navigate our court systems. ALC is affiliated with the AAJC.

Boat People SOS ("BPSOS")
BPSOS is a national Vietnamese-American organization with 13 branch offices nationwide serving some 10,000 Vietnamese refugees and immigrants each year. In 1990, BPSOS established Legal Assistance for Vietnamese Asylum Seekers ("LAVAS"), providing legal aid and conducting advocacy with regard to refugee protection. BPSOS has since expanded its domestic operation to include a large array of human services to Vietnamese refugees and immigrants. In our longstanding work with

citizenship applicants, VAWA applicants, and refugees we have assisted long term residents of this country who are risk for removal due to one crime and often lack adequate representation and knowledge of our legal system. In our long term work in immigration and international human rights, we recognize the need for strong due process safeguards in our country, and it is because of this interest that we participate in this brief.

The Fred T. Korematsu Center for Law and Equality ("Korematsu Center")

The Korematsu Center is a nonprofit organization based at Seattle University School of Law and works to advance justice through research, advocacy, and education. The Korematsu Center is dedicated to advancing the legacy of Fred Korematsu, who defied the military orders during World War II that ultimately led to the internment of 110,000 Japanese Americans. He took his challenge of the military orders to the United States Supreme Court, which upheld his conviction in 1944 on the ground that the removal of Japanese Americans was justified by "military necessity." Fred Korematsu went on to successfully challenge his conviction and to champion the cause of civil liberties and civil rights for all people. The Korematsu Center, inspired by his example, works to advance his legacy by promoting social justice for all. It has a special interest in promoting due process and fairness in the courts of our country, especially when it involves the removal of individuals with extensive ties to the United States. We note that the Korematsu Center does not, in this brief or otherwise, represent the official views of Seattle University.

Hmong National Development, Inc. ("HND")
HND is a national, nonprofit organization developing capacity to ensure the full participation of Hmong in society. HND works with local and national organizations, public and private entities, and individuals to promote educational opportunities, to increase community capacity, and to develop resources for the well-being, growth, and full participation of Hmong in society. Historically, we have provided advocacy on behalf of Hmong refugees who are disadvantaged in removal proceedings due to lack of resources and language abilities.

The National Korean American Service & Education Consortium ("NAKASEC")
NAKASEC was founded as a consortium in 1994 by local community centers that realized that only by coming together can we build and contribute to a national movement for civil rights. Our mission is to project a national progressive voice on major civil rights and immigrant rights issues and promote the full participation of Korean Americans in American society.

National Asian Pacific American Bar Association ("NAPABA")
NAPABA is the national association of Asian Pacific American attorneys, judges, law professors and law students. NAPABA represents the interests of over 40,000 attorneys and 58 local Asian Pacific American bar associations. Its members include solo practitioners, large firm lawyers, corporate counsel, legal service and non-profit attorneys, and lawyers serving at all levels

of government. Since NAPABA's inception in 1988, it has promoted justice, equity and opportunity for Asian Pacific Americans, as the national voice for Asian Pacific Americans in the legal profession. These efforts have included civil rights advocacy on various fronts. NAPABA joins *amici* to preserve due process in immigration proceedings, where fundamental rights of many Asian Pacific Americans are at stake.

National Asian Pacific American Women's Forum ("NAPAWF")

NAPAWF is the only national, multi-issue APA women's organization in the country. NAPAWF's mission is to build a movement to advance social justice and human rights for APA women and girls. We have a history of advocating for the rights of immigrant women and girls given their particular vulnerabilities within the immigration system, especially due to their economic status, lack of education, resources, and language capacities.

The National Asian American Pacific Islander Mental Health Association ("NAAPIMHA")

NAAPIMHA is a non-profit organization that was developed to address the mental health needs of Asian Americans, Native Hawaiians and Pacific Islanders. NAAPIMHA is concerned with the basis for removal in the *Nijhawan v. Holder* case, particularly since Nijhawan has two children who are U.S. citizens. In such cases, deportation is an extreme sentence that impacts not only the individual, but places unfair burden on the family and in essence also punishes family members who are innocent victims.

National Council of La Raza ("NCLR")
NCLR the largest national Hispanic civil rights and advocacy organization in the U.S., works to improve opportunities for Hispanic Americans. Through its network of nearly 300 affiliated community-based organizations, NCLR reaches millions of Hispanics each year in 41 states, Puerto Rico, and the District of Columbia. Founded in 1968, NCLR is a private, nonprofit, nonpartisan, tax-exempt organization headquartered in Washington, D.C. To achieve its mission, NCLR conducts applied research, policy analysis and advocacy providing a Latino perspective. NCLR has played a key role in advocating for fair immigration policies for many years. Approximately 40% of the country's 45 million Hispanics are foreign-born and since many Latinos live in mixed-status families, the vast majority of our nation's Latinos are directly affected by immigration policy. NCLR files this brief to present the implications of removal of Latino lawful permanent residents who have established ties to their communities.

Organization of Chinese Americans ("OCA")
OCA is a national organization dedicated to advancing the social, political, and economic well-being of Asian Pacific Americans in the United States. Founded in 1973 as the Organization of Chinese Americans, OCA aims to embrace the hopes and aspirations Asian Pacific Americans in the United States. OCA conducts advocacy and education throughout its 80 chapters. OCA has long advocated for the civil rights of Asian Pacific Americans, and as such, has a strong interest in promoting due process in all of our courts.

Appendix

Sikh American Legal Defense and Education Fund ("SALDEF")
Founded in 1996, SALDEF is the oldest Sikh American civil rights and advocacy organization in the United States. Its mission is to protect and promote the civil rights of Sikh Americans and ensure a fostering environment for future generations of Sikh Americans through advocacy and education. As a faith-based civil rights organization, SALDEF favors vigorous defense of due process principles in proceedings that result in permanent removal of individuals with families and children.

South Asian Americans Leading Together ("SAALT")
SAALT is a national organization dedicated to fostering civic and political engagement for the South Asian community in the United States through a social justice framework that includes policy analysis and advocacy, community education, and leadership development. SAALT has been a leading voice for just and humane immigration reform for the South Asian community through advocacy with Congressional legislators and government agencies. SAALT joins in filing this amicus brief to ensure the protection of due process rights of immigrants in removal proceedings, particularly for lawful permanent residents with established ties to the United States.

Southeast Asia Resource Action Center ("SEARAC")
SEARAC is a national non-profit organization advancing the interests of Southeast Asian Americans through leadership development, capacity building and

community empowerment. Established in 1979 to assist with the resettlement of the largest resettlement of refugees to the U.S. from Southeast Asia, SEARAC continues to be a leading advocate for these communities. SEARAC has been a strong advocate on immigrant rights, particularly around due process and the deportation of lawful permanent residents, many of whom arrived in the U.S. as refugees and have been longtime residents. Through our work on due process and deportation issues with congressional and federal decision makers and with Southeast Asian American families who are directly affected we recognize the unfair and detrimental impact our current policies have in communities across the U.S. As such, we support the AAJC in their submission of this brief to highlight the impact of deportation on lawful permanent residents.